Supreme Court
FILED

No. (1)

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In The
Supreme Court of the United States

DECOMA LOVE-LANE,

Petitioner,

v.

DONALD MARTIN, Individually,

Respondent.

ON CONDITIONAL CROSS-PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in its application of this Court's precedent affirming summary judgment in favor of the Winston-Salem/Forsyth County Board of Education and Donald Martin, officially, on Love-Lane's free speech claim?

PARTIES TO THE PROCEEDING

Conditional cross-petitioner, DeComa Love-Lane, is the plaintiff and was the appellant in the proceedings below. Donald Martin, in his individual capacity, was a defendant and appellee in the proceedings below. The Winston-Salem/Forsyth County Board of Education and Donald Martin, in his official capacity, also were defendants and appellees in the proceedings below.

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DeComa Love-Lane, conditionally cross-petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 355 F.3d 766. It is also included in the appendix to the petition for writ of certiorari filed by petitioner, Donald Martin. [Pet. App. 1a] The Fourth Circuit denied petitioner's motion for rehearing *en banc* on February 18, 2004. [Pet. App. 95a] The opinion of the district court is reported at 201 F. Supp. 2d 566.

STATEMENT OF JURISDICTION

The original petition for writ of certiorari filed by petitioner, Donald Martin, was docketed on May 21, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of Petitioner's petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the

> right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I.

42 U.S.C. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Background

DeComa Love-Lane is an African-American educator who has been employed with the Winston-Salem/Forsyth County Schools since 1974. Upon her employment, school system documents describe her as "one of the best black prospects . . . ever interviewed," who "is very interested in students (white and black)–it makes no difference." *JA 427.* She served as a school teacher until 1988. *JAS 1199.*[1]

In 1988, Love-Lane was promoted to the position of assistant principal. She was assigned to Atkins Middle School in Winston-Salem. There, she worked under principal Don Golding. Love-Lane excelled in her performance as an assistant principal during her first assignment at Atkins. During each of the three years of her assignment, she was evaluated as excellent or superior in almost all aspects of her performance. Starting in the second year, her principal recommended that she be promoted to principal at some school within the system. *Record, Love-Lane Dep. Exh. 41-43.*

From 1991 to 1993, Love-Lane was assigned to Moore Elementary School as assistant principal. She worked under principal Dr. Marsha Epstein. During each of the two years of her assignment, she was

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[1]Citations to the evidence of record will include references to the Joint Appendix, "JA," and to the Joint Appendix of sealed documents, "JAS," filed with the Fourth Circuit; and to other evidence, as described, in the record below.

evaluated as superior in every aspect of her performance. In each year, her principal recommended that she be promoted to principal at some school within the system. Specifically, Dr. Epstein described Love-Lane as a "particularly strong and effective school administrator" who "is ready for a principalship." *Record, Love-Lane Dep. Exh. 44-45.*

From 1993 to 1995, Love-Lane was assigned to Cook Middle School as assistant principal. There, she worked under principal Ed Armstrong. Again, Love-Lane excelled in her performance and received superior evaluations in all aspects of her performance. She was praised for her ability to "confront issues, not people;" for her openness "with communication and with dealing with critical issues;" and for her "willingness to work with difficult people." *Record, Love-Lane Dep. Exh. 46-47.*

Lewisville Elementary School

During the summer of 1995, Love-Lane received a new assignment from her superintendent, Dr. Don Martin. She was assigned to work at Lewisville Elementary School ("Lewisville") in Lewisville, North Carolina. Martin assigned Love-Lane to this position in spite of recommendations and advice which he had received from a top assistant superintendent that the assignment was "not a good choice." *JA 607-608.* Martin insisted that "an African-American presence" was needed at the school. *JAS 1288; JAS 1211-12.*

The concern expressed by the assistant superintendent, Daisy Chambers, was that Love-Lane

would have a difficult time working under principal Brenda Blanchfield. Ms. Chambers had experienced severe problems at Lewisville in the two years before the assignment. Many staff members and parents in the community had complained to the administration about Blanchfield's leadership. Many of the complaints came from African-American parents and staff members who had experienced significant difficulties with Blanchfield which had led to racial tension.[2] *JA 362-363; JAS 1164; JA 585-602.*

Love-Lane, knowing some of the history of Blanchfield's problems, expressed her fears and concerns to Martin and his assistant, Dr. Joe Johnson. Nevertheless, she assured Martin that she would do her best for the school. She asked Martin to monitor the situation at Lewisville. *JAS 1201.*

Love-Lane remained at Lewisville for the next three years. During the school year 1995-1996, Love-Lane became aware of programs and practices which she believed were detrimental to the interests of African-American children. She expressed her concerns to Blanchfield in a respectful way, but Blanchfield took no action. During the spring of 1996, Love-Lane received a superior evaluation from Blanchfield. *JA 452.*

Tension grew in Love-Lane's second year at Lewisville. Love-Lane observed incidents, policies and practices which adversely impacted African-American

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[2]The difficulties became so divisive that two assistant superintendents, Fred Adams and Daisy Chambers, were called to help resolve the problems. *JA 581; JA 1162.*

students. Love-Lane repeatedly voiced her concerns to Blanchfield and others, but received little support. As she raised such issues more and more, her relationship with Blanchfield began to deteriorate. Love-Lane's expressions of her opinions also led to tension with certain white teachers on the staff at Lewisville. *JAS 1207-1209.*

The focal point of Love-Lane's concern from the first was the "time-out room" which had been established at Lewisville during Love-Lane's first year. The "time-out room" was a small room to which teachers could send students for any reason deemed appropriate by the teachers. Students were assigned to the room for various periods, depending on the teacher and the infraction. A non-certified part-time staff member was placed in charge of the room. There is disputed testimony as to whether the children were given regular academic assignments in the room. What is *not* disputed is that the teachers' arbitrary disciplinary practices led to the referral of a vastly disproportionate number of African-American males and females to the room, many for minor infractions. *JAS 1234-1235; JAS 1170-1196.*

Toward the end of Love-Lane's second year at Lewisville, she received her annual evaluation. She received excellent ratings on most of her work. However, Blanchfield, for the first time, raised questions concerning Love-Lane's "communication" skills. During an evaluation conference, Blanchfield indicated to Love-Lane that "most" of the staff, which she estimated at "85% of the teachers," found her "intimidating," and had objections to Love-Lane's

"direct" style of communication. Pinned down, Blanchfield narrowed the number of complaining staff members to several of the teachers, but refused to provide specific information to Love-Lane concerning these complaints. *JAS 1210; JA 568.*

During the same period, Blanchfield was required to make a recommendation concerning the renewal of Love-Lane's administrative contract. She first recommended that Love-Lane receive a three-year contract as an assistant principal. Following objections from Martin, Blanchfield submitted a new recommendation for a two-year contract. Blanchfield informed Martin that she no longer wished to work with Love-Lane. *JA 513-514.*

Seeing the handwriting on the wall, Love-Lane repeatedly requested transfers to another school, starting in 1996. She was not transferred. *JAS 1211.* During the third year Love-Lane's relationship with Blanchfield deteriorated further. The decline in her relationship with Blanchfield was directly proportionate to her speaking out on issues and incidents involving racial disparities in the treatment of African-American children. A number of incidents occurred before and during her third year (1997-1998) which evidence retaliation against her for speaking out. *JAS 1211-12.*

During the early part of the third year, Martin met with Love-Lane and Blanchfield. During his meetings he observed that Blanchfield's management skills were deficient and that she had made mistakes in dealing with Love-Lane. However, he unequivocally

announced his ultimatum that Love-Lane would have to "satisfy" her principal, Blanchfield, if she were to continue on an administrative track. He also warned her that the children should not be her concern; that she should do what it took to avoid antagonizing Blanchfield. *JA 471-475; JAS 1212.*

Love-Lane made reasonable efforts to get along with Blanchfield and other teachers who had found fault in Love-Lane's communication. *JA 427.* Nevertheless, Love-Lane continued to address issues involving African-American children. As a result, a small faction of teachers complained against Love-Lane. *JAS 1212-1213.*

At the end of the year, Blanchfield transmitted a draft of her evaluation of Love-Lane to Martin. She did not present a copy to Love-Lane. The evaluation rated Love-Lane "below standard" and "unsatisfactory" in a number of areas of performance, based primarily on Love-Lane's "communication." *JA 476.* Based on the draft, Martin issued a directive recommending the demotion of Love-Lane to teacher. *JA 481.* Martin's assistant delivered the demotion decision and Love-Lane's evaluation to Love-Lane on the same date. No effort was made by Martin to speak with Love-Lane concerning the evaluation prior to making his decision. *JAS 1290.*

Love-Lane grieved the decision of Martin before a committee of the school board. *Record, Brown Dep. Exh. 95.* A split committee voted to support Martin's recommendation, and the full board approved the decision thereafter. *Record, Brown Dep. Exh. 95-96.*

Love-Lane was assigned to teach at a high school within the system where she has been working since that time. She continues to excel as a schoolteacher, but as a result of speaking out on issues and incidents involving racial disparities in the treatment of African-American children, Love-Lane has lost any opportunity to pursue her career as an administrator. *JAS 1216.*

Proceedings Below

On August 26, 1999, respondent filed suit in the United States District Court for the Middle District of North Carolina. She alleged several claims against petitioner and the Winston-Salem/Forsyth County Board of Education ("the Board"), including her primary claim that she had been denied her rights under the First Amendment through free speech. Jurisdiction is based on 42 U.S.C. § 1983. Following discovery, petitioner and the Board filed their motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. On March 26, 2002, the district court issued its opinion dismissing all of respondent's claims. *See Love-Lane v. Martin, et. al.*, 201 F. Supp. 2d 66 (MDNC 2002).

A divided panel of the Fourth Circuit reversed the district court's dismissal of respondent's free speech claim against petitioner, in his individual capacity; but affirmed summary judgment for the Winston-Salem/Forsyth County Board of Education

("the Board") on the same claim.[3] *Love-Lane v. Martin, et al.*, 355 F.3d 756 (4th Cir. 2004).[4] On February 18, 2004, the Fourth Circuit denied petitioner's motion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This case presents a conflict between the decision of the Fourth Circuit and other circuits in the application of the standards of Rule 56 of the Federal Rules of Civil Procedure to issues of governmental liability under 42 U.S.C. § 1983. In the event the Court grants the petition of the petitioner, the Court should review the Fourth Circuit's affirmance of the district court's summary judgment of Love-Lane's free speech claim against the Winston-Salem/Forsyth County Board of Education and Donald Martin, in his official capacity.

The Fourth Circuit Erred in its Application of this Court's Precedent Affirming Summary Judgment in Favor of the Winston-Salem/Forsyth County Board of Education and Donald Martin, Officially, on Love-Lane's Free Speech Claim.

1. This Court's guidance regarding governmental liability under § 1983.

Under § 1983, employers are responsible for constitutional violations which arise from their

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[3]The Fourth Circuit affirmed summary judgment on all other claims, as well.

[4]The opinion of the Fourth Circuit will be cited by reference to petitioner's appendix.

policies, customs or practices. *City of Canton v. Harris*, 489 U.S. 378 (1989). Official policy may be established by omission, in the failure of responsible officials to make policy or enact regulations. *Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992); *Avery v. County of Burke*, 660 F.2d 111 (4th Cir. 1981). Liability can also be founded upon a single action by an officer with final decision making authority. *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). A local governmental unit can be held liable under § 1983 for employing a tortfeasor in deliberate indifference to an obvious risk that the tortfeasor would violate plaintiff's constitutional rights. *City of Canton*, 489 U.S. 378; *Board of County Comm'rs. of Bryan County v. Brown*, 520 U.S. 397 (1997)(municipal decision makers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the 'deliberate indifference' – necessary to trigger municipal liability").

In *Board of County Commissioners of Bryan County*, this Court considered, in the context of a Fourth Amendment excessive force claim whether the county should be held liable based on the sheriff's decision to hire the officer who inflicted the injuries. This Court recognized that a policymaker acting with "deliberate indifference," or "conscious disregard" for violations of constitutional rights of which he should be aware would trigger governmental liability. Such evidence would support the notion that the government was the "moving force" behind the injury alleged. *See also, Pembaur v. Cincinnati*, 475 U.S. 469 (1986); and *City of Canton v. Harris*, 489 U.S. 378 (1989). *See also, Brown v.*

Bryan County, 219 F.3d 450 (5th Cir. 2000); *Jeffes v. Barnes*, 208 F.3d 49 (2nd Cir. 2000); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989).

2. The Fourth Circuit's application of the above principles.

The Fourth Circuit affirmed the dismissal of Love-Lane's claims against defendant Martin, in his official capacity, and the Board. The Court properly articulated the guiding standards under this Court's precedent as follows:

> To hold a municipality (a local government entity) liable for a constitutional violation under § *1983*, the plaintiff must show that the execution of a policy or custom of the municipality caused the violation. *Hall, 31 F.3d at 195.* "Municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986).* To hold a municipality liable for a single decision (or violation), the decisionmaker must possess "final authority to establish municipal policy with respect to the action ordered." *Id. at 481.* In this case the Board exercised final review authority over Martin (through the three-person panel of the Board and then the full Board) in approving his decision to

> demote Love-Lane to a teaching position. Only this action by the Board, which involved the exercise of its final policymaking authority, may serve as the basis for Board liability. *Id.* Thus, the Board cannot be held liable for personnel decisions over which it did not retain final review authority; that is, it is not liable for decisions committed to Martin's discretion because there is no respondeat superior liability under § 1983. *See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).* Rather, the Board is only liable for acts that it has "officially sanctioned or ordered." *Pembaur, 475 U.S. at 480.* This means that Love-Lane must demonstrate that the Board was aware of the constitutional violation and either participated in, or otherwise condoned, it. *See Hall, 31 F.3d at 196.*

355 F.3d at 782-83. [Pet. App. pp. 27a-28a]

The Fourth Circuit concluded that the Board was not aware of Martin's retaliatory action. The court summarized its review of the evidence in this regard as follows:

> The minutes of Love-Lane's grievance hearing reveal that Love-Lane did not argue to the Board's three-person panel that either Blanchfield or Martin retaliated against her because she was

exercising *First Amendment* rights. J.A. 278-79. Likewise, Love-Lane's "grievance book," which documented her case to the Board, did not contain anything that would have alerted the Board to her *First Amendment* claim. J.A. 195-96. Each member of the Board, which upheld Martin's decision after Love-Lane appealed the decision of the three-member panel, stated that his or her decision had nothing to do with Love-Lane's speech. Love-Lane thus offers no evidence that the Board punished her for, let alone was aware of, her opposition to race discrimination at Lewisville. In addition, the Board had before it legitimate grounds for upholding Martin's decision. We conclude that Love-Lane has not produced sufficient evidence to hold the Board liable under § 1983 for a violation of her *First Amendment* rights. *Cf. Curtis v. Oklahoma City Pub. Sch. Bd. of Educ., 147 F.3d 1200, 1216 (10th Cir. 1998)* (holding that there was no school board liability where the "record indicates that Plaintiff did not himself inform the Board, either at the pretermination hearing or in writing, that he believed the recommendation was retaliatory"). Accordingly, the district court properly rejected Love-Lane's *First Amendment* claim against the Board.

355 F.3d at 783. [Pet. App. pp. 28a-29a]

3. The Evidence and reasonable inferences of Board ratification

In applying the above standards, the Fourth Circuit overlooked evidence which, viewed in the light most favorable to Love-Lane, demonstrated that Love-Lane had presented the vital issues on which she had been speaking out to the Board, and that the Board ignored these facts in approving Martin's demotion of Love-Lane.

Documents submitted to each Board member during Love-Lane's grievance process establish the board's knowledge of the issues:

(a) Love-Lane specifically noted in her grievance her allegations of racial discrimination and listed various incidents of racial inequality at Lewisville on which she had spoken out. *JAS 1019.*

(b) Love-Lane presented a letter, dated March 30, 1998, (in addition to documents of similar substance) which detailed disciplinary actions by certain teachers that were abusive and unfair about which Love-Lane had been speaking out. Within the letter Love-Lane notified Blanchfield that certain teachers are telling white children that "black children will get them in trouble." When confronted,

these teachers stated that they considered this statement a "fact and good advise [sic]." *JA 526.*

(c) A letter from Blanchfield to Love-Lane acknowledged Love-Lane's opposition to the time out room and stated that Blanchfield considered Love-Lane's "continued vocal opposition to our implementation of the Time-Out Room as blatant disrespect for me...." *JAS 1268.*

Perhaps more importantly, a prominent member of the board, Geneva Brown, testified to her knowledge of Love-Lane's opposition to discriminatory practices at Lewisville, and the general unfairness of Martin's demotion of her. *Record, Geneva Brown Dep. pp.16, 30.* Brown's testimony, excerpts of which follow, raise an inference of notice to the Board which the Fourth Circuit found lacking:

- Ms. Brown testified that she was well-aware of the racial tension at Lewisville which preceded Love-Lane's assignment. In fact, she had been asked to conduct diversity workshops at the school to try to alleviate the problems. *Record, Geneva Brown Dep.*, p. 74.

- Ms. Brown testified that when the issue concerning Love-Lane's demotion was presented to the Board, Martin informed the Board that, "[w]e have to do something about DeComa Love-Lane". *Record, Geneva Brown Dep.*, p. 65.

- Ms. Brown testified to some knowledge of Love-Lane's speech in the following:

  Q: But you knew - did you have thoughts that maybe it was because DeComa Love-Lane was speaking out and that somebody wanted to shut her up?

  A: That could - that's a possibility, yes.

  Q: And that could be a factor in the recommendation?

  A: It could be.

  Record, Geneva Brown Dep., pp. 73-74.

- Ms. Brown testified, in addition, that, in her view, the Board accepted Martin's position without discussion or question:

  Q: Did anybody say, "why do we have to do something about DeComa Love-Lane?"

  A: No, they didn't ask why.

  Q: They just rubber-stamped it.

  A: They probably already knew.

- For these reasons, Ms. Brown was not comfortable voting in favor of Martin's recommendations, and felt that overall, Ms. Love-Lane had not been given "a fair shake." *Record, Geneva Brown Dep.*, p 9.[5]

While it is true that the minutes of Love-Lane's grievance hearing before the Board's panel does not reflect that she labeled Martin's action in terms of the First Amendment; she made it clear in her grievance and materials, as well as her comments at the hearing,

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[5]Martin's presentation was further suspect because "[h]e didn't go into any details. That's what bothered me" *Geneva Brown Dep.*, p.65. In contrast, Blanchfield "was brought down here [to central office], which to me was not a demotion, even though she had a little cut in salary." *Geneva Brown Dep.*, p. 9.

that she was continuing to speak out on issues of racial discrimination in the school which had lead to her demotion. Under this Court's precedent Love-Lane provided due notice to the Board that, in her view, both Martin's action, and her conflicts with Blanchfield (her principal), derived from the same speak activity on which the Fourth Circuit found that she had proved her claim against Martin in his individual capacity.

Finally, Board members' conclusory (and by-in-large identical) declarations denying that the basis of their action was Love-Lane's speech, was disputed by the above testimony of board member Geneva Brown and by questions concerning their credibility due to their own interests in the matter. As emphasized time and again by our courts, including this Court, questions of credibility, particular those involving motive, are for the jury. "Where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators and hostile witnesses ... (T)rial by affidavit is no substitute for trial by jury ... ." *Potter v. Columbia Broadcasting System, Inc.*, 364 U.S. 464, 473(1962).

4. The Fourth Circuit's review of the evidence concerning Board ratification is in conflict with Rule 56 and this Court's precedent and decisions of other circuits; and in the event this Court decides to review factual issues raised in the Petition of Martin, the Court should review the important federal issues raised in this conditional cross-petition.

The above evidence, at least inferentially, placed the Board on notice that it was approving a retaliatory demotion. The Fourth Circuit decision to the contrary conflicts with the important principles set forth by this Court in *Bryan County* and *Harris*, as well as the decisions of other circuits. *See Settlegoode v. Portland Public Schools et al*, 362 F.3d 1118 (9th Cir. 2004); *Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000); *Jeffes v. Barnes*, 208 F.3d 49 (2nd Cir. 2000); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989).

Accordingly, in the event that this Court grants review of issues raised in Martin's petition—essentially factual issues—the Court should permit full presentation of the issue presented herein.

CONCLUSION

There is sufficient evidence to present to the jury regarding Love-Lane's claim of Board liability for Martin's violations of Love-Lane's rights of free speech. Thus, in the event that this Court grants the petition of defendant Martin, it should also grant the conditional cross-petition to review the Fourth Circuit's decision

affirming the dismissal of the Board and Martin, in his official capacity.

Respectfully submitted,
this the 21st day of June, 2004.

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RESPONSE TO CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

1. Undisputed Facts Regarding Love-Lane's Conduct and the Reaction by Superintendent Martin and the Board.

During Cross Petitioner Plaintiff DeComa Love-Lane's three-year tenure as Assistant Principal at Lewisville Elementary, she became entwined in clashes with several teachers, as well as her supervising Principal, Brenda Blanchfield ("Blanchfield"). These conflicts spanned numerous topics—from such insignificant administrative matters as where to stand during bus duty to issues like disciplinary practices which Love-Lane perceived to be racially discriminatory. J.A. 131, 740, 823, 858-59, 866-69, 955, 968-69, 1153, 1252. These conflicts escalated throughout Love-Lane's tenure at Lewisville Elementary and led to the involvement of two different Assistant Superintendents, as well as direct involvement by Superintendent Donald Martin. J.A. 165, 289, 968-69, 1002-03. Superintendent Martin received reports from his Assistant Superintendents regarding Love-Lane's disrespectful conduct toward her Principal and various faculty, and then Superintendent Martin observed her behavior first hand in meetings where she refused to follow even the most minor of her supervisor's instructions. J.A. 165, 289, 968-69, 1002-03. In a final effort to get Love-Lane and Blanchfield to work together, Martin prepared an October 28, 1997 memo in which he concluded the administration of the school had been adversely affected and outlined his expectations for both Love-Lane and Blanchfield for that school year. J.A. 166-67, 172-73, 471-75, 688-92, 741, 969, 976-80.

Even after Martin issued that memo, Love-Lane continued her disruptive behavior. J.A. 162-64, 185-88. Indeed, in January 1998, a group of fifth-grade teachers took concerns directly to Martin regarding Love-Lane's

communications and interactions with them. J.A. 725, 825-26, 957-58, 970-71, 1155-56. Similarly, Assistant Superintendent Bell reported continued difficulties with Love-Lane. J.A. 287-90, 970-71.

In the spring of 1998, Martin reorganized the administrative team at Lewisville, returning Love-Lane to a teacher position, J.A. 290, 297, 971-73, 986, and moving Blanchfield to an administrative position at the home office with a reduction in pay, J.A. 290, 735, 742-43, 971-72. In response to this, Love-Lane filed a formal grievance, which was heard by a three-member panel of the School Board. J.A. 160-61, 272-73, 303-04, 972, 990-96, 1024-25. The panel received documentation agreed upon as the relevant record in the matter by the School System's attorney and Love-Lane's attorney and also heard statements from Love-Lane's attorneys, from Love-Lane herself, and from Martin and Blanchfield. J.A. 273, 304, 1025. The panel affirmed Martin's decisions by a vote of two to one. J.A. 262-67, 273, 304, 972, 1025-26. Because the panel decision was not unanimous, Love-Lane had the opportunity to appeal the panel decision to the full Board and she did so. J.A. 273-74, 972, 1025-26. Having been provided with and considering the record of the panel hearing, the audiotape of the panel hearing, and legal arguments from Love-Lane's attorneys and from the School System's attorney, the Board voted to sustain the decision of the panel. J.A. 273-74, 314-15, 321-22, 324-25, 334-35, 338-39, 342-43, 972, 1025-26; Record, Exhibits 1 and 2 to December 13, 2000 Declaration of Douglas Punger.

2. The District Court's Grant of Summary Judgment.

Pursuant to its federal question jurisdiction, 28 U.S.C. § 1331, 42 U.S.C. § 1983, the district court considered the undisputed evidence in this case and granted summary judgment in favor of Defendants on all of Plaintiff's claims. Specifically with regard to her free speech retaliation claim

against Martin in his official capacity and against the Board, the district court explained that Love-Lane's speech regarding discriminatory discipline was intertwined with her personal difficulties in getting along with her Principal and was expressed in a context that "was more in her capacity as a public school administrator than as a private citizen." Pet. App. 84a. Therefore, the district court concluded that her speech was not on a matter of public concern. Pet. App. 84a. In addition, the district court pointed to "substantial evidence of the disruption and destruction of working relationships caused by Plaintiff's expression, some of it by Plaintiff's own admission," to conclude that "Defendants' interest in maintaining the effective functioning of Lewisville by removing Plaintiff, a disruptive and dividing influence, far outweighs Plaintiff's interest in First Amendment expression." Pet. App. 84a-85a.

In addition, the district court considered the potential liability of Martin in his official capacity for any constitutional claims. The district court concluded that claims against Martin in his official capacity were essentially claims against the Board and should be dismissed as redundant. Pet. App. 89a. With respect to the Board's liability for constitutional claims, the district court held that "Plaintiff has not established that any policy, custom, or final decision of the Board resulted in any constitutional violations she has alleged", and, therefore, granted summary judgment in the Board's favor. Pet. App. 89a.

3. Affirmation by the Fourth Circuit.

The Fourth Circuit panel affirmed the dismissal of the claims against Martin in his official capacity as redundant. Pet. App. 29a. Similarly, with respect to the Board, the Fourth Circuit "conclude[d] that Love-Lane has failed to demonstrate the necessary involvement on the part of the Board." Pet. App. 28a. Accordingly, the Fourth Circuit

affirmed the district court's grant of summary judgment in favor of the Board. Pet. App. 28a-29a.

REASONS FOR DENYING THE WRIT

This Court's rules state that "[a] petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Cross-Petitioner Plaintiff DeComa Love-Lane's Conditional Cross Petition for Writ of Certiorari does not provide compelling reasons for this Court to review the Fourth Circuit's decision affirming summary judgment in favor of Respondents Defendants Donald Martin (in his official capacity) and the Board. To the contrary, in her Cross Petition, Love-Lane expressly admits that that the Fourth Circuit "properly articulated the guiding standards under this Court's precedent", and merely asserts that "the Fourth Circuit overlooked evidence." Cross Pet. 15. Such allegations of error are identified as the very type that normally will not lead the Court to grant review: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. As described more fully below, this case does not present the rare circumstance where such review would be appropriate, and, therefore, the Cross-Petition should be denied.

1. The Fourth Circuit's Opinion Is Not in Conflict with This Court's Precedents.

Love-Lane asserts that the Fourth Circuit's decision "is in conflict with Rule 56 and this Court's precedent . . . in [*Board of County Commissioners of*] *Bryan County* [*v. Brown*] and [*City of Canton v.*] *Harris*."[1] Cross Pet. 20.

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[1]Neither Rule 56 nor the cases to which Love-Lane refers address the redundancy of official capacity claims. Thus, Respondents presume that Love-Lane does not seek

Neither the *Harris* nor the *Bryan County* case discusses Rule 56's standards for summary judgment. In addition, neither case provides guidance on municipal liability with which the Fourth Circuit's opinion could be said to conflict.

In *Harris*, the Court addressed whether a municipality could be held liable for the constitutional violation committed by its employee if the municipality failed to provide appropriate training to the employee. 489 U.S 378, 388 (1989). The Court held that inadequacy of "training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employee] come[s] into contact." *Id.* Similarly, in *Bryan County*, the Court considered whether a single deviation from normal hiring practices by the policy-making official was sufficient to impose liability for the constitutional violation committed by the employee who had been hired through the deviation in practice. 520 U.S. 397, 408 (1997). Specifically, the employee officer in *Harris* had been hired in spite of his record of having pleaded guilty to misdemeanors including assault and battery, resisting arrest, and public drunkenness. *Id.* at 401. As in *Harris*, the Court in *Bryan County* applied a "deliberate indifference" standard, explaining that, "unless

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review of the Fourth Circuit's dismissal of claims against Martin in his official capacity. To the extent Love-Lane seeks such review, the Cross Petition should be denied because the Fourth Circuit acted consistently with this Court's decision in *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). In addition, although Martin in his individual capacity is identified as the respondent in the caption of the Cross Petition, none of the points in the Cross Petition seem to be directed at portions of the Fourth Circuit's opinion affecting Martin in his individual capacity, nor does the conclusion of the Cross Petition seek review with respect to Martin, individually. Accordingly, this Response does not address such matters.

in light of that record [the officer's] use of excessive force would have been a plainly obvious consequence of the hiring decision" no liability can attach. *Id.* at 415.

In contrast to the *Harris* and *Bryan County* cases, this case does not present a situation in which there is an attempt to hold the Board responsible for a constitutional violation committed by an employee of the Board. Rather, the Board itself retained the final power to decide whether or not to reassign Love-Lane to a teaching position and whether or not to renew her administrator contract. Thus, as stated by the Fourth Circuit, "This means that Love-Lane must demonstrate that the Board was aware of the constitutional violation and either participated in, or otherwise condoned, it." Pet. App. 28a. The focus here is on whether or not the Board engaged in a constitutional violation itself, not whether some other action by the Board—failure to train or deviation from hiring practices—led to a constitutional violation committed by one of its employees. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (explaining that "when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies" and it is for the decision resulting from such review that the municipality may be liable); *see also Farmer v. Brennan*, 511 U.S. 825, 840-41 (1994) (recognizing limits on applicability of *Harris*' deliberate indifference standard beyond the situation addressed in *Harris)*. Thus, the cases with which Love-Lane claims the Fourth Circuit's decision is inconsistent do not provide analogous situations upon which an inconsistency could be based.

Of course, the *Harris* and *Bryan County* cases do reiterate certain general, broadly-applicable principles of municipal liability, and with respect to those principles, the Fourth Circuit did act consistently. In particular, those cases warn that "[w]here a court fails to adhere to rigorous

requirements of culpability and causation, municipal liability collapses into respondeat superior liability. . . .[and] Congress did not intend municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights." *Bryan County* 520 U.S. at 415; *accord Harris*, 489 U.S. at 385. The Fourth Circuit looked specifically at the actions attributable to the Board to determine if the evidence could support a conclusion that the Board deliberately caused a deprivation of Love-Lane's constitutional rights. Pet. App. 27a-28a. In performing such an analysis, the Fourth Circuit acted consistently with *Harris* and *Bryan County*.

2. The Fourth Circuit Did Not Error in Applying Rule 56.

The Fourth Circuit's holding—that the summary judgment evidence could not support a conclusion of deliberate deprivation of Love-Lane's constitutional rights by the Board—is consistent with applicable Rule 56 standards. Rule 56 states that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). When a summary judgment motion is made and properly supported, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." FED. R. CIV. P. 56(e).

This Court has provided long-standing guidance on these Rule 56 standards. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, this Court explained that "the

issue of fact must be 'genuine'", something more than "some metaphysical doubt as to the material facts." 475 U.S. 574, 586 (1986). In *Anderson v. Liberty Lobby, Inc.*, this Court stressed that "this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." 477 U.S. 242, 247-48 (1986). The Court went on in *Anderson* to explain that "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs [materiality]." *Id.* at 248. With respect to genuineness of the dispute, the Court explained that "[I]f the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

Applying these guidelines to the summary judgment evidence, this Court has imposed a reasonableness requirement: "all justifiable inferences are to be drawn in [the non-movant's] favor." *Id.* at 255. A genuine issue of fact only exists if the factual issues "may reasonably be resolved in favor of either party." *Id.* at 250 (emphasis added). This determination must be made by reviewing the record as a whole. *Matsushita*, 475 U.S. at 587. "[T]he court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached . . . .'" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000).

In her Cross Petition, Love-Lane identifies three items from a 400-page grievance notebook that was prepared as background materials for the Board when it considered whether or not to approve the decision to move Love-Lane to a teacher position and to not renew her administrator contract. Cross Pet. 15-16. Love-Lane's grievance to the Board did not allege violation of her free speech rights.

Instead, it identified the following specific legal claims: "1. Defamation-(libel and slander) 2. Intentional Infliction of Emotion Distress 3. Racial Discrimination." J.A. 1019. In addition, Love-Lane was represented by two attorneys (both of whom spoke on her behalf at the Board panel hearing) who could have presented her free speech allegations directly to the Board. J.A. 278. This is the objective, undisputed, unimpeached evidence from which the Fourth Circuit determined that it would not be reasonable to infer that the Board knew that it was adopting a violation of Love-Lane's constitutional rights when it approved Love-Lane's reassignment and non-renewal of her administrator contract. Pet. App. 28A. The fact that the record before the Board included a few documents reflecting Love-Lane's allegedly protected speech and/or that one Board member admittedly knew that Love-Lane had engaged in such speech does not equate to a reasonable inference that the Board knew it was adopting a violation of Love-Lane's constitutional rights. *Cf. Mason v. Village of El Portal*, 240 F. 3d 1337, 1340 (11th Cir. 2001) (explaining that "there can be no municipal liability unless all three members of the Council who voted against reappointing Plaintiff shared the illegal motives"). Indeed, as this Court explained in *Bryan County*, the relevant inquiry is not knowledge of an underlying fact (in this case the fact of allegedly protected speech, in *Bryan County* the fact of prior convictions in a background check). Rather, the relevant inquiry is knowledge of an actual constitutional violation, or, as described in *Bryan County* "a plainly obvious consequence" of the underlying fact was a constitutional violation. *Bryan County*, 520 U.S. at 415. No such plainly obvious consequence could have been inferred here. There were over 400 pages of documentary evidence of reasons unrelated to the allegedly protected speech to justify the reassignment and non-renewal. This was coupled with the declarations of each Board member regarding his/her decision on the matter. Love-Lane seeks to have inferences drawn in her favor that simply are not reasonable from the

undisputed evidence presented, and the Fourth Circuit's refusal to draw such unjustified inferences is inconsistent with this Court's guidance on Rule 56 standards.

3. The Fourth Circuit's Opinion Does Not Conflict with Other Circuits.

Love-Lane claims that the Fourth Circuit's refusal to draw such unjustified inferences in her favor is inconsistent with the precedents of other circuits. To support this allegation, she cites four cases: *Settlegoode v. Portland Public Sch.*, 362 F.3d 1118 (9th Cir. 2004); *Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000); *Jeffes v. Barnes*, 208 F.3d 49 (2nd Cir. 2000); *Bordanaro v. McLeod*, 871 F.2d 1151 (1st Cir. 1989). *Brown*, *Jeffes*, and *Bordanaro* are all cases, like *Harris* and *Bryan County*, that provide little guidance in this matter because liability was sought be imposed for the constitutional violation of an employee due to the municipalities'/public official's failure to train the employee. There are no such allegations here, and, therefore, these cases do not support an assertion of a circuit conflict.

Moreover, when the courts in those cases drew inferences in the plaintiffs' favor regarding the policy makers' constructive knowledge of the employees' constitutional violations, the inferences were based on evidence showing the unconstitutional behavior to be "so widespread or flagrant that in the proper exercise of their official responsibilities the municipal policymakers should have known of them." *Bordanaro*, 871 F.2d at 1157; *accord Brown*, 219 F.3d at 458 (describing evidence of actual awareness of "youth, inexperience, personal background, and ongoing arrest activities . . . along with the highly predictable risk of injury from the improper use of force by an untrained officer" as providing sufficient notice of the need to train); *Jeffes*, 208 F.3d at (pointing to evidence of direct encouragement of the retaliatory actions

and to the "widespread and conspicuous" nature of the underlying constitutional violations to infer knowledge of them). No evidence of widespread, flagrant constitutional violations exists here. Thus, the types of inferences drawn in those cases, would not be appropriate here.

With respect to the *Settlegoode* case (which was amended and superseded by 371 F.3d 503 (9th Cir. 2004)), the court specifically declined to hold the school board liable because there was no proof of ratification or a pattern and practice. 371 F.3d at 516 n.11. Thus, it, too, provides little guidance for the issues here, and does not present a circuit conflict.

CONCLUSION

For the reasons identified, Love-Lane's Conditional Cross Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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